
MULUK AHMAD & ANOR.**v.****PUBLIC PROSECUTOR**

SUPREME COURT, KUALA LUMPUR

LEE HUN HOE CJ (BORNEO)

MOHD. YUSOFF MOHAMED SCJ

AJAIB SINGH SCJ

[CRIMINAL APPEAL NO. 37 OF 1986]

3 APRIL 1989

CRIMINAL PROCEDURE: *Trial within a trial in respect of a cautioned statement - Right of the defence to recall "witnesses" in respect of a cautioned statement in a trial within a trial before a jury - Whether proper time to recall witnesses would be before the close of the prosecution case in a trial within a trial.*

This was an appeal by the two accused who were charged with four offences of murder under s. 302 of the Penal Code. They were, however, found guilty and convicted on the alternative verdict under s. 301 of the Penal Code and sentenced to 10 years on each charge and the sentences were to run concurrently.

The Court decided to hear the parties on one main issue in the appeal, that is, the right of the defence to recall "witnesses" in respect of a cautioned statement in a trial within a trial before a jury. The learned Judge rejected totally the application of the defence to recall in a trial within a trial before a jury. The defence argued that the proper time for defence to recall witnesses would be before the close of the prosecution case in a trial within a trial.

Held:

[1] Once the cautioned statement was admitted the accused should be allowed to call all the witnesses who had given evidence in the trial within the trial before the learned Judge alone to testify again in the presence of the jury and that would include the accused. The procedure would mean that the accused would not have to wait until the defence is called.

[Appeal allowed. Retrial Ordered.]

Cases referred to:

Yaacob v. PP [1966] 1 MLJ 67

Lee Kok Eng v. P.P. [1976] 1 MLJ 125

Yau Sun Fatt v. P.P. [1988] 1 CLJ (Rep) 305

R. v. Francis & Murphy 43 Cr App R 174

R. v. Murray 34 Cr App R 203

Legislation referred to:

Criminal Procedure Code, s. 214(iii)

Penal Code, ss. 301, 302

For the appellants - T.S. Marbeck (Yusof Khan with him); M/s. Yusof Lee Pathma & Marbeck

For the respondent - Abdul Hamid bin Mohamed, DPP

JUDGMENT**Lee Hun Hoe CJ:**

We allowed the appeal, set aside the conviction and quashed the sentence. A retrial was ordered. We stated we would give our reasons later. We do so now.

- a** The facts may be stated shortly. On 23 May 1984 at about 11.00 a.m. four deceased, namely, Chong Voon Khim @ Chong Voon Khin, Ching Thin Man, Chan Siew Fan @ Chong Siew Fan and Len Yew Fah went fishing at the fish ponds at their rubber small holding at Sungei Mas, Taat Seng Estate, Raub, Pahang. On that day Platoon No. 2 of A Company of the 8th Royal Malay Regiment was deployed near Pimco Estate not far away from the fish ponds. The platoon was under the command of 2nd Lieutenant Mohd bin Md. Jais. The platoon
- b** was temporarily deployed there to collect their rations and salaries. 2nd Lieutenant Jais instructed 5 members of his platoon to patrol the vicinity of the area. Accused 1 and accused 2 were among the five selected. They left their base in the early morning and later in the morning they reached the fish ponds. Expended cartridges at the scene indicated that they were fired by two rifles used by accused 1 and accused 2. The four deceased were shot at, not once, not twice but not less than 13 bullets were fired at their heads.
- c** The cause of death of each deceased was a result of extensive head injury with complete destruction of the brain. The two accused were charged with four offences of murder under s. 302 of the Penal Code. They were, however, found guilty and convicted on the alternative verdict under s. 301 of the Penal Code and sentenced to 10 years on each charge and the sentences were to run concurrently. They appealed.
- d** The Court decided to hear the parties on one main issue in the appeal, that is, the right of the defence to recall 'witnesses' in respect of a cautioned statement in a trial within a trial before a jury. The learned Judge rejected totally the application of the defence to recall witnesses in a trial within a trial before a jury. In Vol. II, p. 445 we found the following:
- Encik Since recording office has recorded D90, I would like the witnesses in relation
Faiza: to P90 to be cross-examined in presence of jury. Please see *Lee Kok Eng v. P.P.*
[1975] 1 MLJ 125.
- e**
- Court: I think witnesses in the *voir dire* will give evidence when defence is called assuming it is called. We are concerned with the trial within the trial now.
- DPP : I agree.
- f** Encik Yusof Khan who appeared for the defence in the High Court cited *Yaacob v. PP* [1966] 1 MLJ 67 and *Lee Kok Eng v. PP* [1976] 1 MLJ 125 to support the proposition that the proper time for defence to recall witnesses would be before the close of the prosecution case in a trial within a trial. In Vol. III p. 708 the record of proceedings show:
- DPP: *Yaacob's* case - authority to say that defence has right to cross-examine witnesses in a trial within trial - not authority for that right to be exercised immediately. More sensible and logical procedure that is adopted. Earlier ruling applies.
- g**
- Court: Accused may give evidence on general issue of case and on specific issue as to voluntariness. He has a right to call witnesses. And prosecution may before close of prosecution case call any witness it likes.
- h** Before us the case of [1988] 1 CLJ (Rep) 305 was cited. The contention of Encik Abdul Hamid bin Haji Mohamad for the respondent is that *Yaacob's* case [1966] 1 MLJ 67 is only an authority for giving the defence an opportunity to call or recall witnesses before a jury. It is not an authority for saying that it must be done before the close of the prosecution case. *Lee Kok Eng's* case [1976] 1 MLJ 125 merely confirmed *Yaacob's* case [1966] 1 MLJ 67. [1988] 1 CLJ (Rep) 305 was the first case to rule that opportunity must be given to the defence to recall witnesses before the close of the prosecution case. He submitted that [1988] 1 CLJ (Rep) 305 relied on *Yaacob's* case [1966] 1 MLJ 67 which merely said opportunity must be
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given in due course and *R. v. Francis & Murphy* 43 Cr App R 174 which was neutral really as it merely stated witnesses might be called during the trial. This Court was influenced by the fact that appellant chose to remain silent.

At p. 307 of [1988] 1 CLJ (Rep) 305 it is explained thus:

How could this be possible if the accused chose to remain silent when called for his defence, as the jury would not have heard his allegations. If the weight and value of the cautioned statement were matters for the jury then it is only right that they should be allowed to hear the allegations of the accused. The accused must be given the opportunity to be heard by the jury before being called upon to enter into his defence. As Lord Goddard said in *R. v. Murray* (34 Cr App R 203, 207 concerning the confession:

Its weight (of the confession) and its value were for the jury, and in considering its weight and value the jury were entitled to form their opinion on the way in which it has been obtained.

The truth of the confession is not directly relevant at the *voir dire*, but it will be a crucial question for the jury once the Judge admits it.

It is only right to point out the learned Judge made the ruling in 1986 whereas [1988] 1 CLJ (Rep) 305 was decided in 1988. He chose the most convenient and time-saving course. That was also the course adopted by the learned Judge in *Yaacob's* case [1966] 1 MLJ 67. Nevertheless, it must be stressed that this Court did not support the learned Judge's interpretation of the words "due course" in *Yaacob's* case [1966] 1 MLJ 67 to mean that the accused could give evidence in his defence could repeat his allegations. This Court made clear that once the cautioned statement was admitted "the accused should be allowed to call all the witnesses who had given evidence in the trial within the trial before the learned Judge alone to testify again in the presence of the jury and that would include the accused. The procedure would mean that the accused would not have to wait until the defence is called ..."

The judgment in [1988] 1 CLJ (Rep) 305 concluded in these words:

As the accused chose to remain silent after the close of the prosecution case, the failure to allow him to repeat his allegations in the presence of the jury has deprived him of a fair trial. A cautioned statement such as that produced in the instant appeal may sometimes be the mainstay of the case for the prosecution, and the opportunity to repeat his allegations to the jury before the close of the prosecution case is the proper and indeed the fairest way of enabling the latter, as sole judge of fact, to come to a fair decision as to its weight and value. This right is of particular significance in view of the power given by s. 214(iii) of the Criminal Procedure Code to the jury to return a verdict of not guilty at the conclusion of the evidence for the prosecution. Consequently, we consider that a conviction so arrived could not stand. Therefore, we allowed the appeal, set aside the conviction, quashed the sentence and ordered a retrial.

If this procedure is considered to be tedious, inconvenient and time-consuming, the proper remedy would be for the legislature to amend the law.

Also found at [1989] 2 CLJ 393